IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 24 OF 2004.

Shri Ruffus Leo Manuel,
son of Joseph Manuel,
32 years of age,
permanent resident of
Kalaniketan, Watt's Road,
Thiruvanthapuram, Kerala,
presently lodged at
Aguada Jail,
Aguada, Bardez, Goa. .... Appellant.

Versus

S T A T E,
Through the Officer-in-Charge,
Anti-Narcotic Cell,
Panaji, Goa. .... Respondent.

Shri A.V. Nigalye, Advocate for the Appellant.

Shri S.N. Sardessai, Public Prosecutor for the State/Respondent.

CORAM: N. A. BRITTO, J.

DATE: 24th AUGUST, 2005.

J U D G M E N T:

This appeal is filed by the accused against the Judgment dated 12.05.04 of the learned N.D.P.S. Court at Mapusa convicting him under Section 20(b)(ii) of the N.D.P.S. Act, 1985 (Act, for short) and Order dated 9.06.04 sentencing him to undergo R.I. for five years and to pay a fine of

Rs.50,000/- and in default to undergo S.I. for six months under Section 20 (b)(ii) r/w Section 20(b)(ii)(B) of the N.D.P.S. (Amendment) Act, 2001.

2. The case of the prosecution was that on 30.1.01 at 15.00 hrs., P.S.I. Prabhudessai of A.N.C. P.S. (Anti-Narcotic Cell Police Station) received specific and reliable information that a person of a particular description [which later on fitted the accused] would be coming near Centurion Bank, Calangute between 22.00 to 23.00 hrs. on the same day to deliver a consignment of charas and the said information was reduced to writing and a copy of which was handed over to Dy.S.P. Shri D'Souza and pursuant to the said information P.S.I. Prabhudessai proceeded to Calangute at about 20.05 hrs. along with panch witnesses and police officers and at about 22..20 hrs. when the accused being the person of the given description, came from Calangute bazaar, he was surrounded and when his personal search was taken it was found that he was carrying a white colour polythene bag in which 1.25 kgs. of charas [written as 1.025 grams and then changed to 1.025 Kgrams] were found which were packed and sealed in the presence of panchas, but the accused refused to sign the panchanama or other documents. The accused was also found with cash of Rs.130/- and thereafter the accused was taken in custody.

3. To prove the charge against the accused, the prosecution examined

P.W.1 Kaissare, the Junior Scientific Officer who had analysed the said article found with the accused, P.W.2 P.S.I. Shet Gaonkar who had forwarded the said charas to P.W.1 Kaissare in the Directorate of Food and Drugs Administration where after having received the same from A.N.C. P.S., P.W.3 Zuwarkar and P.W.4 Gaonkar being the panch witnesses, who at the relevant time were working as Lascars-Peons in N.C.C. Office, Goa Battalion, Panaji, P.W.5 P.S.I. Prabhudessai, P.W.6 Dy.S.P. D'Souza and P.W.7 P.S.I. Uday Naik.

4. The learned N.D.P.S. Court did find omissions and contradictions while assessing the evidence of the panch witnesses, but found that they were minor and the same did not affect their credibility so as to make the case of the prosecution improbable. The learned N.D.P.S. Court after considering the evidence produced by the prosecution, came to the conclusion that the case of the prosecution was proved beyond reasonable doubt.

5. At the hearing of the appeal, the first objection taken by Shri Nigalye, the learned Advocate of the accused is that there has been non-compliance of S.57 of the Act. As per Shri Nigalye the A.N.C. P.S. did have a Police Inspector and the Police Inspector was the immediate official superior of P.W.5 P.S.I. Prabhudessai and it is he who ought to have been informed and

not the next superior officer namely Dy.S.P. Shri D'Souza. Shri Nigalye has submitted that it is evident from the evidence of P.W.5 P.S.I. Prabhudessai himself that there was a Police Inspector in-charge of the Police Station for he has also stated in his evidence that intimation under S.57 of the Act was sent to Dy.S.P. through the P.I., A.N.C. P.S

On the other hand, Shri Sardessai, the learned P.P. has submitted that the provisions of S.57 of the Act are not mandatory. Learned Advocate Shri Nigalye as well as learned P.P. Shri Sardessai have relied upon certain decisions to support their respective submissions. In my view the submissions of the learned Advocate Shri Nigalye cannot be accepted either on facts or on law.

6. Section 57 of the Act deals with report of arrest and seizure to be made, and provides that whenever any person makes any arrest or seizure under this Act, he shall, within forty eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest of seizure to his immediate official superior. The intimation under S.57 of the Act was produced at Exh.37 and it can be seen therefrom that it was submitted to S.P., C.I.D., Panaji, as well as to Dy.S.P., Panaji through P.I., A.N.C., P.S., Panaji. P.W.7 P.I. Uday Naik has stated that on 31.1.01 he was P.S.I. of A.N.C. P.S. holding the charge of A.N.C. P.S. It can be seen from Exh.37 that there was an endorsement made by P.S.I. on behalf of P.I. of A.N.C.

P.S., Panaji and not only that P.W.6 Addl. S.P. who at the relevant time was the Dy.S.P. has confirmed that P.S.I. Uday Naik (P.W.7) was the Officer-in-charge of he said A.N.C. P.S. though normally a Police Inspector was in-charge of the said Police Station. P.W.5 P.S.I. Prabhudessai too has stated that he handed over the attached property to P.S.I. Naik who was in charge of the Police Station. It follows therefrom that the report of arrest and seizure was rightly sent to the next immediate superior officers namely Dy.S.P. De Souza as well as to S.P. as can be seen from Exh.37 itself.

7. In the case of ***State of Punjab v. Balbir Singh (A.I.R. 1994 S.C. 1872)*** the Supreme Court held that the provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay, etc., then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case. However, subsequently the Supreme Court speaking through its three learned Judges in the case of ***Mohinder Kumar v. State, Panaji, Goa [(1998) 8 S.C.C. 655]*** ***[***a decision on which reliance has been placed by Shri Nigalye], proceeded to state after referring to Balbir Singh's case (supra) that the provisions of Ss.52 and 57 of the Act which deal with the steps to be taken

by the officer after making arrest or seizure are mandatory in character. In the case of ***Thandi Ram v. State of Haryana [(2000) 1 S.C.C. 318]*** on which reliance was again placed by Shri Nigalye, it has been held that in case the provisions of Sections 55 and 57 are not complied with, the conviction is bad in law and cannot be sustained, but again in the case of ***Gurbax Singh v. State of Haryana (A.I.R. 2001 S.C. 1002)*** it has been held that the provisions of Sections 52 and 57 are directory and violation of these provisions would not ipso facto violate the trial or conviction, but the I.O. cannot totally ignore these provisions and, as such, failure will have a bearing on appreciation of evidence regarding the arrest of the accused or seizure of the article. Later, In the case of ***Sajan Abraham v. State of Kerala [(2001) 6 S.C.C. 692]*** the Supreme Court again speaking through its three learned Judges, has held that S.57 is not mandatory in nature and once substantial compliance is made, it would not vitiate the case of the prosecution. There is preponderance of judicial opinion in support of the proposition that when two Benches of equal number of Judges differ in their view, it is the view in the later decision which ought to prevail, and being so, it is the view in the case of Sajan Abraham (supra) which should hold the field as far as S.57 of the Act is concerned. I have already stated that either on facts or on law, the submission made on behalf of the accused that the case of the prosecution ought not to have been accepted because there has been failure in complying with S.57 of the Act, cannot be accepted.

8. The next submission made on behalf of the accused by Shri Nigalye is that the raid is a creation of P.W.5 P.S.I. Prabhudessai and the same is not supported by independent reliable evidence as the evidence of both the panch witnesses appears to be suspicious. In reply, it has been submitted by Shri Sardessai that minor discrepancies are bound to be there in the evidence of each and every witness and therefore the same should be ignored and as stated by the Supreme Court in the case of ***State of West Bengal v. Mir Mohammad Omar and others, etc. (A.I.R. 2000 S.C. 2988)*** an effort should be made to salvage the case of the prosecution.

9. The learned Judge of N.D.P.S. Court did observe that there were omissions or contradictions in the evidence of panch witnesses which were minor in nature and which did not affect their credibility to make the case of the prosecution improbable and therefore they ought not to be given much weight. In my view the discrepancies in the evidence of the panch witnesses namely P.W.3 Zuwarkar and P.W.4 Gaonkar are more than sufficient to discard their evidence, that the accused was arrested in the manner, and at a time and place as alleged by the prosecution. As stated by P.W.5 Prabhudessai, who admittedly was heading the raiding party, P.W.5 Prabhudessai on 30.1.01 at 15.00 hrs. received a specific and reliable information

about the probable arrival of the accused near Centurion Bank, Calangute which he claims he reduced in writing. Then P.W.5 Prabhudessai is on record to say that he secured the presence of two panch witnesses namely P.W.3 Zuwarkar and P.W.4 Gaonkar and told them about the receipt of the said information. The aforesaid evidence of P.W.5 Prabhudessai is meant to give a clear impression that after the receipt of the said information he secured the presence of the panch witnesses and although both P.W.3 Zuwarkar as well as P.W.4 Gaonkar initially tried to give the same impression by stating that they were told by Col. Duggal to go to A.N.C. P.S. since a letter was received from the Police Station, their cross-examination shows otherwise. The evidence of P.W.3 Zuwarkar as well as P.W.4 Gaonkar has been falsified by P.W.4 Gaonkar himself by production of the office note dated 29.1.01 – Exh.30 which shows that Lt. Col. Duggal had deputed them to report to A.N.C. P.S. on 29.1.01 and not on 30.1.01. The same office Note Exh.30 also shows that both P.W.3 Zuwarkar and P.W.4 Gaonkar were permitted to avail of compensatory off on 30.1.01 in lieu of 29.1.01. The cross-examination of P.W.3 Zuwarkar shows that the said Col. Duggal had told them about their acting as panch witness at 2.30 p.m. This obviously could not be true in case the information itself was received at 3.00 p.m. on 30.1.01. Further cross-examination of P.W.3 and P.W.4 shows that they were at the Police Station two or three days

prior to the said raid to act as panchas. If P.W.3 Zuwarkar has stated they had sat in the canteen at the Police Station for tea on that day and the charges for the same were paid by the police, P.W.4 Gaonkar has stated that both of them had paid for their canteen bill and again he has stated that the bill was settled by him. The evidence of both the said witnesses gives an impression that both of them, though working for Goa Battalion of N.C.C. were almost on deputation at the Police Station for several days and their out of pocket expenses were made by the Police. They had even stayed there at night. P.W.5 P.S.I. Prabhudessai has chosen not to produce the requisition made by him to the Director of Sports and Youth Affairs and therefore adverse inference has got to be drawn against the prosecution that any letter was sent at all on 30.1.01. In cross-examination he has admitted that the said employees were reporting previously but he was unable to state how many days prior to the raid they were reporting. On the contrary P.W.7 Naik says that they were secured by deputing a constable. If P.W.3 Zuwarkar has stated that after going to Calangute near Centurion Bank all of them who were members of the raiding party, hid in one place and in one group, P.W.4 Gaonkar has stated that all of them had remained hidden, spread out in the area and that they did not remain hidden in groups of two and three. On the contrary P.W.5 P.S.I. Prabhudessai not knowing as to which of the

panch witnesses he had to support, has stated that all of them had scattered in the vicinity of the Centurion Bank, but he could not say in how many groups they had organized themselves. He has also stated that there were more than two groups. These contradictions to a great extent are sufficient to strike at the credibility of both the panch witnesses, considering that it has been stated by P.W.5 Prabhudessai that they had reached Calangute at 20.05 hrs. and were waiting there for more than two hours till about the time the accused appeared at the scene at 22.20 hrs. Further, P.W.3 Zuwarkar has stated that the accused was taken to a distance of 7-8 metres near the tube light for taking his search, but P.W.4 Gaonkar has stated that the panchanama was recorded in the torchlight although at the same time he has stated that the panchanama was not done at the place where there was a tube light and it was done at a distance of about 75 metres from Centurion Bank, and, with a view to balance the contradictions appearing in the evidence of both the aforesaid witnesses, P.W.5 Prabhudessai has stated that the panchanama was done with the help of the torchlight as well as the tube light. P.W.7 P.I. Uday Naik though claims he was present, was unable to describe the street light, whether it was an ordinary light or an halogen lamp or a sodium vapour lamp or anything else. If P.W.5 P.S.I. Prabhudessai has stated that the panchanama was signed by both the panchas and himself at

the scene and the accused has refused to sign the same, P.W.3 Zuwarkar has maintained that the panchanama was signed at the A.N.C. P.S. though it was written on the spot. Though P.W.4 Gaonkar was examined subsequently, the prosecution has failed to get any corroboration from him as to where the panchanama was signed, whether it was signed at the spot or after their return to A.N.C.P.S. at Panaji. If P.W.6 de Souza who was the highest rank officer in the raiding party has stated that the accused was placed under arrest at Calangute and then they returned at about 03.00 hrs., there is no explanation from P.W.5 Prabhudessai as to why the arrest of the accused was shown at 06.20 hrs. Then there is discrepancy regarding what is referred to by the learned Judge of N.D.P.S. Court as the “K factor” to which reference in a greater detail would be made little later. P.W.3 Zuwarkar has stated that he does not know when the letter 'K' was prefixed to the word 'grams.' either on the panchanama – Exh.20 or the seizure report – Exh.21. But according to P.W.4 Gaonkar, the letter 'K' was written at the time of the panchanama itself, both in the panchanama as well as the seizure report. When P.W.5 Prabhudessai was questioned about the same, he has stated that upon taking the weight of the substance as 1.25 kgs. (written as 1.025 grams) he found that there was an error while making the record in the panchanama as 1.025 grams instead of Kgs. and which error was continued while

writing the seizure report and later in the complaint. But while filing the charge sheet, this discrepancy was realised and as such he personally corrected the same by introducing the alphabet 'K' after the weight and before 'grams.' so that it read as 1.025 Kgrams. Here it may be noted that according to P.W.5 Prabhudessai what the accused was found was 1.25 kgs. which was written by him as 1.025 grams. and then added the letter 'K' to the word 'grams.' The manner in which the figure was written by P.S.I. Prabhudessai, it gave an impression what the accused was found with was 1 kg. and 25 mgs. and not 1 Kg, 25 gms. and it is this mistake which he corrected. It has been submitted by Shri Nigalye that the panchanama was a record of what the panchas had seen and observed and therefore P.S.I. Prabhudessai could not have unilaterally carryied out the changes in the panchanama without the consent of the panch witnesses. The explanation given by P.W.5 P.S.I. Prabhudessai does not carry much conviction. If he had noticed the said mistake at the time of filing the charge sheet then the said mistake continued on the charge-sheet without any correction and there is again no explanation as to how the correction was carried out on the muddemal register – Exh.42 without the permission of P.W.7 P.I. Uday Naik who is said to have been in charge of the said Police Station at the relevant time and who has otherwise remained silent as regards the said change in the said

muddemal register. If P.W.5 P.S.I. Prabhudessai could make such unilateral changes both in the panchanama as well as in the muddemal register the documents prepared by him would not carry much conviction. The aforesaid discrepancies are vital and make the case of the prosecution doubtful regarding search and seizure as alleged by the prosecution from the person of the accused. By no stretch of imagination the said discrepancies in their totality could be considered to be of minor nature not affecting the credibility of the case of the prosecution, but in fact the discrepancies when taken in their totality make the story of the prosecution doubtful in nature and therefore the accused in my view ought to have been given the benefit of doubt.

10. However, the case cannot be allowed to stand only at that. There is a shortage of about 19 grams. found in this case which the prosecution has failed to explain in the evidence of the prosecution witnesses or at the time of arguments. As already stated, it is the case of the prosecution that the accused was found with 1.25 kgs. of charas. Section 37 of the Act as regards provision for bail was amended w.e.f. 2.10.01 and the G.R. Quantifying small quantities and commercial quantities was brought about from 19.10.01. As far as charas, small quantity was stated to be 100 gms. and commercial quantity as 1000 gms. The accused approached this Court

in Cr.M.A. No.16/02 contending that his case was a border-line case as the substance allegedly seized from him was 1.025 kgs. inclusive of polythene bag and polythene wrappers and that the weight of polythene bag and polythene wrappers were not specified either in the seizure report or the Chemical Analyser's report. This Court felt that it was indeed a border-line case and the actual weight of the substance would be within 1000 gms. and therefore by Order dated 8.2.02 this Court ordered that the Special Judge should submit the entire muddemal i.e. charas along with the polythene bag and the wrappers to the Chemical Analyser for determining their correct weight to specify the weight of the polythene bag and the wrappers and the substance separately. After that the accused was given opportunity to renew his application for bail before the Special Judge. Consequently, as can be seen from the evidence of P.W.1 Kaissare the bare substance/charas weighed 960 gms. The weight of the transparent colourless wrappings was found to be 20 gms. and that of the polythene bag was 10 gms. P.W.1 Kaissare has stated that he had taken 200 gms. of the substance comprising of 10 cylindrical sticks and 6 flat circular pieces as representative samples for analysis and had taken about a gram from each piece to carry out his test; that takes away about 16 gms. for analysis, but leaves only 1.006 kgs. of charas when the claim of P.W.5 Prabhudessai was that the accused was found with 1.25 kgs. The learned Judge of the N.D.P.S. Court has not paid much attention to this aspect of the case though she has stated that the

weights taken by the police on the spot were by approximation while those taken in the laboratory were with precision, when this was not the case of P.S.I. Prabhudessai himself !

11. Shri Sardessai has also not been able to provide any explanation much less a plausible explanation as to why there should be shortage of as much as 19 gms. of charas. His only submission is that P.W.5 Prabhudessai had weighed the charas with the help of a goldsmith's scale while the weighing in the laboratory was done with a precision scale. There is no whisper as regards this in the evidence of the prosecution witnesses. The evidence of P.W.1 Kaissare was completed on 13.3.02 while that of P.W.5 Prabhudesai was completed on 7.1.04 and some explanation ought to have been given by P.W.5 Prabhudessai regarding the said shortage found in the sample. It is to be noted that a gram on either side of 1 kg. could provide or deny bail to an accused and therefore weighment by a police officer cannot be as casual as it has been found in this case. One can understand if the difference was within 5 gms. because it has been stated by P.W.3 Zuwarkar that P.W.5 P.S.I. Prabhudesai had used unit measures of 1 kg., 10 gms. and 5 gms. though I am at pains to understand as to whether an article of one kg. can at all be weighed in a goldsmith's scale ! Whatever may be the reason behind the weight being found short, the same does affect the credibility of the case of the prosecution that the accused was

found with 1 kg, 25 grams of charas. The benefit of the shortage ought to go to the accused. It may also be noted that the sample was received back from the laboratory on 23.3.01 and sent to the NDPS Court on 29.3.01. P.W.5 P.S.I. Naik had stated in one breath that it was given to P.S.I. Prabhudessai but in another breath he has stated that it was kept in safe custody. The balance quantity was not recorded on the Muddemal register – Exh.42 after its return and one does not know into whose custody and in what condition it was lying before it was sent to the Court.

12. In view of the above and considering the discrepancies found in the evidence of the main prosecution witnesses, the case of the prosecution does not inspire confidence and therefore the accused certainly was entitled to be given benefit of doubt.

13. Hence I allow the appeal, set aside the impugned Judgment/Order and acquit the accused under Section 20(b)(ii)(B) of the Act, 1985. The bail bonds of the accused shall stand cancelled. The M.O. shall be disposed of in accordance with the Order dated 9.6.2004 of the learned Special Judge.

N. A. BRITTO, J.

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